

## INTELLECTUAL PROPERTY AND THE WIPO “DEVELOPMENT AGENDA”

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### Introduction

Knowledge has an important role in development. Today economies of the technologically advanced countries are knowledge based, affirming the conclusion that knowledge is a major engine of economic growth and thus critical for development. Knowledge is such that the use of a piece of knowledge does not diminish another person’s use of that piece of knowledge.<sup>1</sup> As Thomas Jefferson put it, “he who receives an idea from me, receives instruction himself without lessening mine”. Another characteristic is that, once in the public domain, no one is restricted from using that knowledge.

The intellectual property (IP) regime provides the legal means to appropriate knowledge. IP are rights granted by society to individuals or organizations for their creative works, preventing others from making unauthorized use of their work for a limited period of time. It is based on the rationale that IP protection will create incentives for the generation of knowledge. That is, allow the innovator an opportunity to recoup its costs and make a fair return. These rights take many forms *i.e.* patents, copyrights, industrial designs, trademarks, geographical indications and trade secrets. The grant of IP rights is premised on the belief that this right must be balanced with the need to protect public interests, especially where the social costs exceed private returns.

However as companies - especially multinationals in developed countries - realize the potential returns of appropriating knowledge, particularly with the recent advances in biotechnology and information and communication technology (ICT), many are seeking to control the Knowledge Economy through the use of strong IP protection and enforcement.

This was the primary motivation of the industry sector in the United States (US), the European Union (EU) and Japan (which dominate the world’s software, pharmaceutical, chemical, entertainment and many other industries) when it aggressively lobbied for the inclusion of minimum IP standards as part of the single undertaking during the General Agreement on Tariffs and Trade (GATT) Uruguay Round and masterminded the crafting of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS): they are the major beneficiaries of the TRIPS system. Developing countries, on the other side, are its victims, as they primarily are net importers or users of technology mainly supplied by the developed countries.

### Impact of IP systems on developing countries

Recent studies show the high extent of costs incurred by developing countries following obligations under the TRIPS Agreement. The former chief of trade policy research in the World Bank, Michael Finger, found that through the TRIPS Agreement, developing countries took on

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<sup>1</sup> World Bank (1998), *World Development Report 1998/1999. Knowledge for Development.*

as legal obligation a cost of USD 60 billion per year, but there is no legal obligation in the agreement on any member to provide anything in exchange.<sup>2</sup> Another World Bank report estimates that the net annual increase in patent rents resulting from TRIPS for the top six developed countries in this field will be USD 40 billion (with the top beneficiaries being the United States with USD 19 billion, Germany USD 6.8 billion, Japan USD 5.7 billion, France USD 3.3 billion, United Kingdom USD 3 billion and Switzerland USD 2 billion). Developing countries that will incur major annual net losses include South Korea (USD 15.3 billion), China (USD 5.1 billion), Mexico (USD 2.6 billion), India (USD 903 million) and Brazil (USD 530 million).<sup>3</sup> In addition, there are financial and human resource costs for administering and enforcing IP laws and policies, requiring law reform, enforcement agencies and legal expertise that have to be borne by the developing country.

Besides the redistributive impact, extension of IP rights can have negative impacts on the domestic research and development as it restricts the route of reverse engineering, imitation or the making of minor improvements that had been crucial in the development of technological capabilities in the now advanced countries. Developed countries in their early stages of development were resistant to applying strong IP standards as it hindered their domestic innovation and development.<sup>4</sup> An option that is no longer available to developing countries following the TRIPS Agreement. A study conducted by the Commission on Intellectual Property Rights set up by the British government concluded that “those developing countries that have acquired significant technological and innovative capabilities, there has generally been an association with *weak* rather than *strong* forms of IP protection in the formative period of their economic development.”

The monopoly rights granted to the IP holder also leads to widespread monopoly pricing and other restrictive behaviours by IP holders, particularly the multinational companies. This, in turn, leads to problems such as high prices and limited access to essential goods such as medicines and educational materials, limited access to information and technology and inputs that are necessary for production. All these are tools which developing countries must possess to expedite their development process.

These are but some of the challenges facing developing countries today. While they are still managing with the implementation of the TRIPS Agreement, TRIPS-plus standards are being imposed on them through World Intellectual Property Organization’s standard setting and harmonizing exercises.

### **World Intellectual Property Organization (WIPO)**

Prior to the TRIPS Agreement, WIPO was the primary specialized agency dealing with IP issues. In 1970, WIPO replaced the Bureaux Internationaux Reunis pour la Protection de la Propriété Intellectuelle (BIRPI), the secretariat to the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works at that time. In 1974, it became a “specialised agency of the UN”.

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<sup>2</sup> Finger, J.M. (2002), *The Doha Agenda and Development: a view from the Uruguay Round*, Asian Development Bank, Manila.

<sup>3</sup> World Bank (2002), *Global Economic Prospects and the Developing Countries*, Washington DC.

<sup>4</sup> Chang, H.J. (2001), *Intellectual Property Rights and Economic Development. Historical Lessons and Emerging Issues*, Third World Network, Malaysia.

The lack of an enforcement mechanism propelled key industry players, particularly from the US, to shift the IP regulatory framework from WIPO to GATT, which had an enforcement mechanism and would permit the use of trade remedies to enforce IP standards.<sup>5</sup>

The advent of TRIPS created a dilemma for WIPO as it diminished its importance as the principal organization dealing with IP regulation. To preserve its relevance, in 1995 WIPO entered into a cooperation agreement with the World Trade Organization (WTO) to provide technical assistance to developing country members of the WTO on TRIPS related issues. WIPO also had to show the developed countries, particularly the US and its industry, that it still was the IP standard setting organization and could deliver results. This became particularly more important as about 90% of its funding comes from the private sector by way of fees paid by patent applicants (most of which are from developed countries) under the Patent Cooperation Treaty (PCT).<sup>6</sup>

A WIPO publication titled *Intellectual Property - A Power Tool for Economic Growth*, by Director-General Dr. Kamil Idris, gives an insight into the perspective prevailing at WIPO. The organisation believes that “the absence of an IP culture results in a stagnant or receding economy [and] a reduction in creativity and inventiveness”. It also states that “IP can only thrive in a culture in which its importance is fully understood and accepted and in which it is protected by laws that are vigorously enforced. WIPO’s mission will continue to be to work for robust IP protection and enforcement to ensure its continuing vitality.”<sup>7</sup>

Today WIPO administers diverse IP rules and is the principal organization actively involved in the development of intellectual property standards and rules. In pursuing what it sees its mandate to be, *i.e.* strong IP protection, WIPO has set specific TRIPS-plus agendas,<sup>8</sup> such as the “WIPO Patent Agenda” and “WIPO Digital Agenda”, to bring the standards closer to IP systems already in place in developed countries.

### **TRIPS-plus Agendas at WIPO**

The “WIPO Patent Agenda”,<sup>9</sup> an initiative begun by WIPO’s Director General in 2001, aimed to create an international patent system geared towards the upward development and harmonization of patent laws. It is designed to benefit the users of the patent system, *i.e.* the patentees, which are mostly from developed countries - the US, Japan and Europe. This “Patent Agenda” is expected to disseminate patent systems modelled on developed countries to developing countries.<sup>10</sup>

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<sup>5</sup> See Drahos, P. and J. Braithwaite (2004), *Who owns the Knowledge Economy? Political Organizing Behind TRIPS*, [www.thecornerhouse.org.uk/item.shtml?x=85821](http://www.thecornerhouse.org.uk/item.shtml?x=85821)

<sup>6</sup> Shashikant, S., “WIPO has failed in its development mission” in *Third World Resurgence, Humanizing Intellectual Property: Developing Countries Launch New Initiative*, Third World Network, Issue No. 171-172, 2004, p. 41.

<sup>7</sup> Idris, K. (2003), *Intellectual Property. A Power Tool for Economic Growth*, [www.wipo.int/freepublications/en/intproperty/888/wipo\\_pub\\_888\\_1.pdf](http://www.wipo.int/freepublications/en/intproperty/888/wipo_pub_888_1.pdf)

<sup>8</sup> TRIPS set minimum IP standards for WTO members, which means that subsequent IP agreements negotiated among and/or involving WTO members can only create higher standards - commonly known as “TRIPS-plus”. The TRIPS-plus concept covers both those activities aimed at increasing the level of protection for right holders beyond that which is given in the TRIPS Agreement and those measures aimed at reducing the scope or effectiveness of limitations on rights and exceptions. Such intellectual property rules and practices may be adopted at the multilateral (*e.g.* WIPO), plurilateral, regional or at the national level.

<sup>9</sup> [www.wipo.int/patent/agenda/en/](http://www.wipo.int/patent/agenda/en/)

<sup>10</sup> The US model, in particular, has been criticized as “dysfunctional” and in need of reform by many prominent groups and individuals. See *Third World Resurgence, op cit.* See also Jaffe, A. and J. Lerner (2004), *Innovation and its discontents*, Princeton University Press.

There are also many activities taking place in WIPO related to the “Information Society”. Among the most important are the “WIPO Copyright Treaty” (WCT)<sup>11</sup> and the “WIPO Performances and Phonograms Treaty” (WPPT),<sup>12</sup> known together as the “WIPO Internet Treaties”, which are part of the “WIPO Digital Agenda”<sup>13</sup> announced in September 1999 by the Director General at the *WIPO International Conference on Electronic Commerce and Intellectual Property*. The text of these treaties draws upon studies submitted by national governments, in particular the US, EU and Japan.<sup>14</sup>

The WCT is the most controversial and has been very strongly criticised as it goes beyond what is required under TRIPS Agreement. Some critics have suggested that this treaty is a way of ensuring that US copyright standards, which face strong opposition even in the US itself, become international standards which would thus have to be implemented worldwide. For example, the WCT requires countries to provide for effective legal remedies against circumvention of technological protection measures which are promoted by copyright industries in response to the digital technology which allows for the creation of unlimited, perfect and costless copies and their instant distribution worldwide. Critics argue this will reduce the ability of teachers, students, researchers and consumers, particularly from developing countries, to access information.

Studies have shown that *weak* copyright enforcement has a major impact on diffusion of knowledge and knowledge-based products throughout the developing world. For example, in many poor countries, only through unauthorized copying have they been able to access copyrighted works at a fraction of the price. The US in the 19<sup>th</sup> century, during its early stages of development, justified its persistent refusal to grant copyright protection to foreign authors on the grounds that this was a necessity to meet the nation’s needs for knowledge and enlightenment.

It is often argued by developed countries that favour TRIPS-plus models that ratification or accession to WIPO treaties is voluntary. However, the terms of recent bilateral free trade agreements require developing countries to become a party to many WIPO treaties.<sup>15</sup>

WIPO is also engaged in providing technical and legal assistance to developing countries to implement the TRIPS agreement. In delivering technical assistance its focus is increased protection and enforcement of IP rights. This is evidenced by WIPO’s website, which stresses that its technical assistance programmes “concentrate on the building up of the legal and administrative infrastructure required to protect IP rights.”<sup>16</sup> This includes establishing and modernizing intellectual property systems.

WIPO’s *pro-strong* IP protection position has led many to criticise its technical assistance programmes as emphasizing more on the benefits of the intellectual property and little on the costs.<sup>17</sup> It is also accused of failing on some occasions to inform developing countries of the flexibilities that are available while implementing the TRIPS Agreement. For example, according to a report by Médecins Sans Frontières (MSF), WIPO failed to inform Cambodia of the flexibilities that are available (*e.g.* that it was not required to grant patent protection to

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<sup>11</sup> [www.wipo.int/treaties/en/ip/wct/index.html](http://www.wipo.int/treaties/en/ip/wct/index.html)

<sup>12</sup> [www.wipo.int/treaties/en/ip/wppt/index.html](http://www.wipo.int/treaties/en/ip/wppt/index.html)

<sup>13</sup> [www.wipo.int/copyright/en/digital\\_agenda.htm](http://www.wipo.int/copyright/en/digital_agenda.htm)

<sup>14</sup> Ficsor, M. (2002), *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their interpretations and Implementation*, Oxford University Press.

<sup>15</sup> For example, see the IP Chapter in US-Singapore Free Trade Agreement, US-Morocco FTA, US-Chile FTA available at [www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html)

<sup>16</sup> [www.wipo.int/eds/en/](http://www.wipo.int/eds/en/)

<sup>17</sup> See *Third World Resurgence*, *op cit.*

pharmaceutical products until 2016) under the TRIPS Agreement and the Doha Declaration on Public Health.<sup>18</sup>

The WIPO Secretariat's role and activism in promoting strong IP rights in favour of some developed countries, such as the US, and certain industry groups is particularly problematic. The prevailing perception is that the Secretariat is acting as "an institution with its own agenda" as often the negotiations undertaken would affect the Secretariat which is also the service provider in the Organization as an interested party.

The Secretariat often seeks to influence negotiation outcomes to its benefit or to the benefit of its financial sponsors. Recently, the Secretariat organized what the WIPO statement described as "informal consultations on the future work of WIPO's Standing Committee on Patents (SCP)", which is "working to build consensus on a treaty that seeks to harmonize patent laws around the world". Only selected officials from specific countries were invited to the consultation. A final statement coming out of this meeting supported a proposal submitted by US and Japan on the future work programme of the SCP, although this proposal had been rejected several times before by many WIPO members. The Secretariat, in actual fact, was only supposed to conduct informal consultations to decide on the dates of the SCP meeting. Many developing country officials rejected the outcome of the consultations and charged privately that WIPO had overstepped its mandate by working on substantive issues and that the meeting was arranged in a way that sidelined those countries opposed to the US-Japan-Europe harmonization proposals.<sup>19</sup>

All these developments have given rise to many calls from member States, public interest non governmental organizations (NGOs) and prominent individuals for the reform of global intellectual property systems, generally, and WIPO, specifically.

In November 2004, 500 renowned economists, Nobel laureates, legal experts, academics, scientists and public citizen groups adopted a "Geneva Declaration on the Future of the World Intellectual Property Organization" and urged WIPO to embrace a more balanced agenda for promoting creativity and technology transfer in line with public interest.<sup>20</sup>

The Declaration called for moratorium on new treaties and harmonization of standards that expand and strengthen monopolies, strangle policy space and further restrict access to knowledge. It asked WIPO to consider the creation of bodies to systematically address the control of anticompetitive practices. It endorsed the creation of Working Groups on technology transfer and development, indicated support for a Treaty on Access to Knowledge and called for a fundamental reform of WIPO's technical assistance programmes and amendment of the WIPO Convention to include explicit language on the development dimension.

### **The WIPO "Development Agenda"**

At the 2004 WIPO General Assembly (27 September - 5 October) a group of 14 developing countries, namely Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela - known as the Group of Friends of Development (FOD) - co-sponsored a proposal for the "Establishment of a Development Agenda for WIPO".<sup>21</sup>

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<sup>18</sup> MSF Briefing Paper (2003), *Doha Derailed: A Progress Report on TRIPS and Access to Medicines*, [www.accessmed-msf.org/documents/cancunbriefing.pdf](http://www.accessmed-msf.org/documents/cancunbriefing.pdf)

<sup>19</sup> See [www.wipo.int/meetings/en/details.jsp?meeting\\_id=7128](http://www.wipo.int/meetings/en/details.jsp?meeting_id=7128) for relevant documents on the SCP meeting.

<sup>20</sup> [www.cptech.org](http://www.cptech.org)

<sup>21</sup> WIPO Document WO/GA/31/11.

The proposal received overwhelming support from the floor during the General Assembly (GA) from a large number of developing countries including Egypt (on behalf of the African Group) and Sri Lanka (on behalf of the Asia Group), India, Pakistan, the Philippines, China, Oman, Senegal, Ethiopia, Benin, Peru, Colombia, El Salvador, Nicaragua, Uruguay, Trinidad and Tobago and Jamaica.<sup>22</sup>

The major developed countries were not as supportive of action on a Development Agenda (DA) in WIPO. Group B (comprising industrialized countries) indicated during the GA that WIPO had been doing enough for the developing countries. The US, in particular, argued that the DA proposal appeared to be premised on the misconception that strong IP protection might be detrimental to global development goals and that WIPO had disregarded development concerns.<sup>23</sup>

Following the GA, three Inter-sessional Inter-governmental meetings (IIM) were to discuss proposals submitted by member States.<sup>24</sup>

At the first IIM the FOD Group presented a detailed reform plan to ensure that “WIPO activities and IP discussions are driven towards development-oriented results” and to ultimately mainstream the “development dimension” in all WIPO’s activities.<sup>25</sup> The proposal is also based on the premise that, being a UN agency, development concerns should be given emphasis in WIPO’s activities, since several international organizations have recognized that much more needs to be done to reach effective results that meet the challenges of development.

The proposal emphasizes the relevance of the United Nations Millennium Development Goals (MDGs) which established a firm commitment by the international community to address the significant problems that affect developing and least developed countries. The Plan of Implementation agreed at the World Summit on Sustainable Development (WSSD), the Declaration of Principles of the first phase of the World Summit on the Information Society (WSIS), the Programme of Action for the Least Developed Countries (LDCs) for the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development, the Sao Paulo Consensus adopted at UNCTAD XI and the WTO Doha Development Round have all also placed development at the heart of their concerns and actions.

The FOD proposal is critical of the way WIPO has focused on the diffusion of standardized approaches to IP policies that uncritically assume that development follows suit as intellectual property rights (IPRs) protection is strengthened, although the current worldwide debate is questioning the appropriateness of such an approach. WIPO discussions have overlooked the implications of increased and standardized IPR protection in terms of access to and diffusion of science, technology and related knowledge and know-how to developing countries, states the proposal.

The FOD Group further states in its proposal that the DA initiative promotes a “critical examination of the implications for developing countries of the adoption of increased IPR protection, rather than approach this highly controversial issue as if it were governed by absolute

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<sup>22</sup> Khor, M., “United Nations: Strong support from South for WIPO ‘development agenda’,” South North Development Monitor (SUNS) #5658, 5 October 2004.

<sup>23</sup> *Ibid.*

<sup>24</sup> First IIM: April 11-13; Second IIM: 20-22 June; Third (also final) IIM: 20-22 July, 2005.

<sup>25</sup> WIPO Document IIM/1/4.

truths solely under the one dimensional perspective of the private rights holders, ignoring the broader public interest.”

While recognizing that IP is relevant, the FOD Group stresses that IP is not an end in itself, but a means for promoting public interest, innovation, access to science and technology and the promotion of diverse national creative industries - in order to ensure material progress and welfare in the long run. It is incumbent upon WIPO, therefore, to effectively incorporate development promotion as one of its main goals, as already foreseen by the UN-WIPO Agreement 1974.

To establish a “Development Agenda” for WIPO, the FOD submission contains four concrete proposals:

- A review of the mandate and governance of WIPO;
- Promotion of pro-development norm-setting in WIPO;
- Establishing principles and guidelines for WIPO’s technical assistance work and evaluation;
- Establishing guidelines for future work on technology transfer and related competition policies.

Several regional groupings of developing countries, including Africa, Asia and Latin America and the Caribbean, welcomed the initiative for a Development Agenda in WIPO and expressed support for parts of the FOD proposals.

The Group of 77 developing countries (G77), at the Second South Summit, also called for “WIPO, as a UN Agency, to include in all its future plans and activities the development dimension”.<sup>26</sup>

The FOD proposals have also enjoyed immense support from the public interest NGOs. When the DA proposal was originally presented, an NGO statement signed by over 25 organizations described the DA initiative as an unparalleled opportunity for all developing countries and development oriented NGOs to put on WIPO’s agenda the issue of development and urged developing countries to support it.<sup>27</sup>

Prior to the third IIM, about 132 public interest NGOs from the North and South released a statement endorsing many principles in the FOD proposal.<sup>28</sup>

### **North - South differences**

In contrast to the wide ranging reform plan submitted by the FOD Group, the developed countries view the “Development Agenda” in the limited context of technical assistance.<sup>29</sup>

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<sup>26</sup> Second South Summit, Doha, Qatar, 12-16 June 2005, *Doha Plan of Action*.  
[www.fao.org/Doha%20Plan%20of%20Action%20\(English\).pdf](http://www.fao.org/Doha%20Plan%20of%20Action%20(English).pdf)

<sup>27</sup> [www.cptech.org](http://www.cptech.org)

<sup>28</sup> [www.ipjustice.org](http://www.ipjustice.org)

<sup>29</sup> The US submitted a proposal that WIPO continue to “promote intellectual property round the world” as its way of fostering development. Its suggestion is the creation of a “WIPO Partnership Program”, an Internet-based database to bring together “donors and recipients of IP development assistance”. The US proposal advocates that WIPO should concentrate on promoting intellectual property and should leave development concerns to other UN agencies. See WIPO Document IIM/1/2. The UK’s first proposal, submitted during the first IIM, is more on how WIPO’s technical assistance can be managed. In its second proposal, UK suggested that WIPO’s Permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) be reinvigorated. The proposal stressed its belief that “the effects of this proposal will significantly improve the way that WIPO looks at IP and development”. See WIPO Document IIM/1/5 and WIPO Document IIM/2/3.

Generally, the position of “Group B” at the first IIM was that WIPO already had a development dimension, participation of developing countries in all activities of WIPO was ensured, and WIPO was providing a lot of technical assistance, which could however be improved. They also seemed to favour the use of the existing Permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) to take up technical assistance and development issues.

Differences along mainly North-South lines continued at the second IIM. The main DA proponents and several other developing countries were in favour of organizing discussions at the IIM in a more structured manner so that clear recommendations can be presented to the WIPO 2005 GA. However, other member states, particularly from the developed countries, were of the view that the PCIPD would be a more appropriate forum for discussions.

The FOD Group fear that their initiative would be marginalized if the DA discussion is shunted off to a body which has traditionally dealt only with technical assistance matters and has a low profile. They and several other developing countries would like the DA initiative to have high priority in WIPO and influence over all its activities and committees. This would not be possible if the initiative is placed in the PCIPD. They prefer the initiative to come under the direct oversight of the GA, which would give it a higher visibility and priority. The dispute over “forum” became *the* focal issue at the third IIM and led to the collapse of discussions on the future work plan of the DA.

The US and UK were the only two proposals submitted by the developed countries and received strong support from “Group B”. While development experts may not view these proposals as being constructive for the DA initiative, the process is seen to be “significant in its engagement of developed countries in the IP and development debate”.<sup>30</sup>

In this watershed event more proposals were received from developing countries - Mexico, Bahrain, African Group<sup>31</sup> - taking the opportunity to present their views on the role of IP in development in the WIPO context as well. The proposals by Mexico and Bahrain (co-sponsored by Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates and Yemen) have been criticized as being limited in scope and perspective.<sup>32</sup> Both proposals follow the tone set by the US proposal.

The African Group’s DA plan for WIPO recognizes IP as one mechanism among many for bringing about development, which should be complementary, and not detrimental, to individual national development efforts. Towards this objective, the existing international IP architecture should be made more democratic and responsive to the needs and aspirations of developing and least developed countries, especially in matters that are vital to the needs and welfare of their citizenry. The right to qualitative life, access to vital requirements such as medicines, food, knowledge and prospects for their intellectual and cultural development, should neither be unduly compromised nor hampered by rigid and indiscriminate enforcement of IP rights. The African Group proposal further elaborates on seven specific areas for consideration at the IIM, that is, technical assistance, transfer of technology, reforming the African informal sector, small and medium enterprise, information and communication technology, human resources development and the brain drain, use of flexibilities in international instruments and norm setting.

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<sup>30</sup> South Centre and CIEL IP Quarterly Update: “Second Quarter 2005 Intellectual Property and Development: Overview of Developments in Multilateral, Plurilateral and Bilateral Fora”.

<sup>31</sup> WIPO Doc. IIM/1/3, WIPO Doc. IIM/2/2, and WIPO Doc. IIM/3/2 respectively.

<sup>32</sup> South Centre and CIEL IP Quarterly Update, *op cit*.



As discussion on FOD proposals intensified, major developed countries either opposed or cautiously showed limited and qualified support for the FOD proposals. In particular, the US appeared generally opposed to any FOD proposal put forward. The US disagreed with the proposal to add a “Standing Committee on Transfer of Technology” as this issue could be addressed within the existing framework. It also gave examples of various initiatives as evidence that WIPO is addressing its responsibility pertaining to development. It did not even support a “Treaty on Access to Knowledge” as it disagreed with its premise and strongly believed that IP has been the strongest driver of technology and so such a treaty is not necessary.<sup>33</sup>

The cool response by developed countries to the “Development Agenda” in general, and the FOD proposals in particular, was seen by several developing countries as an attempt to undermine the initiative. Developing countries wanted the third IIM (which had been tasked with preparing the final report for consideration at the 2005 GA) to make a recommendation for the continuation of the IIM process, which shall report to the 2006 GA. Since at the GA many issues are covered, a report with concrete recommendations on the future work plan of the DA would have provided the momentum needed to take this matter forward effectively. However the dispute over “forum” continued to be *the* sticky point at the third (also the final) IIM and hampered discussions on other substantive proposals.

A day before the end of the final IIM session, the EU made a turnaround in its position in support of the renewal of the IIM process.<sup>34</sup> Up until then, the EU had joined in with the US and other developed countries to push PCIPD as the venue for following up on the DA debate. The EU’s position isolated the US, Japan and Canada which were still in favour of PCIPD. The EU’s agreement was, however, qualified by requiring that the IIM process be financed essentially by any funding set aside in the 2006-2007 Programme and Budget for the PCIPD. It also proposed that a subset of proposals should be considered during the IIM process and this subset should be kept to a limited number, comprising those issues that are “ripe for harvest”. The proposals it considered to be “ripe for harvest” were mostly related to technical assistance submitted by WIPO members. Its qualified agreement effectively attempts to convert the IIM process into a forum for discussion about technical assistance matters. It is not clear what the fate of PCIPD would be once the funding is used to finance the IIM process and what would be the fate of other DA proposals that have been submitted if discussions on technical assistance proposals continue for a long time.

Informal, closed-door, small-group meetings were held to resolve these differences and to agree on the content of the report to be submitted to the GA. It was however difficult to consider other substantive proposals and its submission to the GA if the issue of “forum” (proposal supported by developed countries) could not be resolved.

Several developed country delegations, such as Canada, in the closed-door meetings were not in favour of renewing the IIM process but during the plenary session were cautious about rejecting a recommendation to the GA to renew the IIM process and so tactfully stated that the GA should make the decision about the forum.

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<sup>33</sup> This led Brazil to express its frustration that “the US seems to reject anything that can bring changes to this Organization”. It emphasized that “Access to Knowledge is the power tool for development” and noted that once information becomes the property of private corporations it will no longer be accessible to people worldwide and this is of particular concern to developing countries which will not have access to the information. See Shashikant, S. “Development: WIPO ‘development’ meet ends without deciding future work”. South-North Development Monitor (SUNS) #5850, 26 July 2005.

<sup>34</sup> For details on EU position see WIPO Doc. IIM/3/3 Prov.

Strong statements and appeals were made by many developing countries in favour of recommending that the GA renew the IIM process. These include China, Chile, Sri Lanka, South Africa, Algeria, Iran, Nigeria, Bolivia, Colombia and Jordan. Morocco, on behalf of the African Group, supported the proposal to renew the mandate of IIM, saying that their proposals had not yet been discussed at the IIM, and that it should be dealt by IIM as with other proposals. Senegal stressed the need for all proposals to be treated on equal footing. Almost all Arab countries supported the renewal of mandate.

India, in support of the renewal, said that as the meeting had not seriously discussed any single proposal, it was logical to continue with the IIM. This was the “customary thing to do”. To leave open the question of the “forum” for the future was baffling as it was not customary to change horses midstream. “We were asked to change from a horse [referring to the IIM process] to a mule [referring to the PCIPD] and so we remain at a loss why these suggestions were made.”

The final IIM ended late without agreement on recommendations to transmit to the WIPO GA on how to proceed with the initiative of establishing a “Development Agenda” for WIPO. As a result of the inability to reach substantive agreement, the meeting only agreed that the factual reports of the three IIMs, including the statements of all delegates, would be submitted to the GA.

The breakdown in discussions has led to speculations that it was deliberate.<sup>35</sup> A few developed countries decided to block consensus, as their intention was to use the developing countries’ desire to extend the IIM’s mandate as a trade-off for developed countries’ desire to move ahead with negotiations of their proposals, which have been rejected on several occasions and are currently at a standstill at the Standing Committee on Patents.

According to this scenario, this attempt at “trading off” would be made at the GA meeting. It was thus important for no concrete decision on future work to be made at the IIM and to pass on the unresolved matter to the GA (beginning 26 September 2005) for it to decide.

### **WSIS and the WIPO Development Agenda**

In December 2003, governmental representatives gathered in Geneva for the World Summit on the Information Society (WSIS) and adopted a Declaration of Principles<sup>36</sup> where they declared their “common desire and commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life, premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights.”

Due to pressure by major developed countries, the WSIS documents do not address the widely recognized problem - that intellectual property rights can be a barrier to achieving the general goals set out in the Declaration of Principles. The only explicit reference to intellectual property in WSIS Declaration of Principles is in paragraph 42, in the “Enabling environment” section: “Intellectual Property protection is important to encourage innovation and creativity in the Information Society; similarly, the wide dissemination, diffusion, and sharing of knowledge is important to encourage innovation and creativity. Facilitating meaningful participation by all in

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<sup>35</sup> Shashikant, S. (2005), *op cit.*

<sup>36</sup> [www.itu.int/wsisis/docs/geneva/official/dop.html](http://www.itu.int/wsisis/docs/geneva/official/dop.html)

intellectual property issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive Information Society.”

In the “Access to information and knowledge” section of the WSIS Plan of Action<sup>37</sup> it is stated that “Information Communication Technologies allows people, anywhere in the world, to access information and knowledge almost instantaneously. Individuals, organizations and communities should benefit from access to knowledge and information”. But it also states that access to information and knowledge should be done while “respecting intellectual property rights (IPRs) and encouraging the use of information and sharing of knowledge”.

While the WSIS governmental documents do not question existing IP regimes, a declaration issued by civil society organizations<sup>38</sup> at the first phase of the WSIS rejecting the Summit’s official outcomes, expressed that “limited intellectual monopolies, also known as intellectual property rights, are granted only for the benefit of society, most notably to encourage creativity and innovation” and recommended that the UN “carry out a fundamental review of the impact on poverty and human rights of current arrangements for recognition and governance of monopolised knowledge and information, including the work of WIPO and the functioning of the TRIPS agreement”. The declaration also stresses that “efforts should be made to ensure that limited intellectual monopolies stimulate innovation and reward initiative, rather than keeping knowledge in private hands until it is of little use to society.”

The first phase of the WSIS requested the UN Secretary-General to establish a Working Group on Internet Governance (WGIG). The WGIG was asked to present the result of its work in a report “for consideration and appropriate action for the second phase of the WSIS in Tunis 2005”. In its report the WGIG states, with reference to IPRs: “While there is agreement on the need for balance between the rights of holders and the rights of users, there are different views on the precise nature of the balance that will be most beneficial to all stakeholders, and whether the current IPR system is adequate to address the new issues posed by cyberspace. On the one hand, intellectual property rights holders are concerned about the high number of infringements, such as digital piracy, and the technologies developed to circumvent protective measures to prevent such infringements; on the other, users are concerned about market oligopolies, the impediments to access and use of digital content, and the perceived unbalanced nature of current IPR rules.”

In summary, even if discussions about IP issues have deliberately been left out of the WSIS process and the major developed countries have, until now, been successful in confining IP discussions to WIPO and the WTO, the WSIS process has much to contribute and plays a crucial role in the shaping of a new IP regime.

The Civil Society Patents, Copyrights and Trademarks (PCT) Group<sup>39</sup> at WSIS has expressed that, since the WIPO is a specialized agency of the UN, it may rightfully receive input from the WSIS, a general UN Summit. In particular, the WSIS process should contribute to the initiative for a “Development Agenda”. The WSIS should recommend that WIPO adopt patent and copyright policies and positions that would concur with the WSIS Declaration and that facilitate the implementation of the WSIS Plan of Action.

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<sup>37</sup> [www.itu.int/ws/isis/docs/geneva/official/poa.html](http://www.itu.int/ws/isis/docs/geneva/official/poa.html)

<sup>38</sup> WSIS Civil Society Plenary, 8 December 2003, *Shaping Information Societies for Human Needs - Civil Society Declaration to the World Summit on the Information Society*, Geneva. [www.smsitunis2005.org/plateforme/pdf/civil-society-declaration-en.pdf](http://www.smsitunis2005.org/plateforme/pdf/civil-society-declaration-en.pdf)

<sup>39</sup> [www.wsis-pct.org/](http://www.wsis-pct.org/)

## Conclusion

Intellectual property impacts all aspects of life including access to essential items such as medicines, educational materials, inputs for production, etc. For example, an extended copyright protection term which goes beyond what is required under the TRIPS Agreement would protect materials for an extended period of time although it should have fallen into public domain and be available to all without any payment of royalty.

It is thus important to have an IP regime that is balanced. The current national and international IP frameworks are very much tilted in favour of the IP holders, much to the detriment of public interest and even the public domain. Developing countries are the most affected by its negative implications.

Therefore, a review of the international IP framework needs to be undertaken to understand the development implications, costs and benefits of the existing frameworks and identify the imbalances and where appropriate incorporate flexibilities, exceptions and limitations into the frameworks. Future standard setting and harmonization exercises should only be undertaken after sufficient evaluation and understanding of the implications of such an exercise.

At WIPO the “Development Agenda” initiative provides developing countries with an ideal opportunity to begin the process of reform. Developing countries should tenaciously pursue this initiative.

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